No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972.

72-874

ARTHUR M. JOHNSTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ARTHUR M. JOHNSTON,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Arthur Milton Johnston, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 26, 1972. A petition for rehearing was timely filed and denied on November 16, 1972.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A.

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JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 27, 1972. A timely petition for rehearing was filed and denied by order of Court on November 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Petitioner was convicted of possession and sale of dangerous drugs. (Title 21 U.S.C., Sec. 331(q)(2); 331(q)(3). He was first tried September 6, 1968, and was found guilty on all counts of the information. Prior to that trial, he made a demand for production of a witness, a paid Government informant, by the name of Powell. The District Court granted the order; Powell was produced and did testify as a witness for the Government at the first trial. Petitioner was convicted and an appeal was taken to the United States Court of Appeals for the Seventh Circuit. On May 14, 1970, the Court of Appeals reversed the judgment of conviction and remanded the cause for a new trial. *U. S.* v. *Johnston,* 426 F.2d 1112.

The cause was reset for trial before a jury on May 26, 1971. On May 21, 1971, counsel for the Government stated to counsel for the defendant that he had been unable to locate the witness Powell; he, further, stated that he did not intend to call the witness Powell as part of his case in chief. He stated that the Government had contact with the witness up until last Christmas (December, 1970), that in the last six weeks Powell's mother had been contacted by an Indiana State Police Officer and related to said police officer that she had not heard from her son in excess of a month; that he was going to Indianapolis, Indiana, then to Florida to pick fruit and left no forwarding address.

On the morning of May 26, 1971, before the commencement of the trial, petitioner moved for a continuance based upon non-production of the witness Powell. Powell was a paid Government informant who made the initial inducement, outside the presence of any witness, to the petitioner and made other inducements in the presence of a police officer and the defendant only. It was the petitioner's contention that, since his only defense was that of entrapment, the only effective manner in which the petitioner could develop that defense in the absence of Powell would be to forfeit his constitutional right not to testify.

In a colloquy held in chambers and not reported, but supported by the affidavit of petitioner's counsel, the District Judge stated to counsel for petitioner that he would permit the prior reported testimony of Powell to be read into evidence only if the petitioner would waive any objections to the non-production of the witness Powell. The petitioner refused to accept that condition. The motion for continuance was denied; trial was had; and the petitioner was found guilty. The questions presented under this heading are:

(A) Whether the same considerations which require disclosure of an informant as set forth in *Roviaro* v. *U. S.* (1957) 353 U.S. 53, 77 S.Ct. 623 require production of such an informant by the Government at the trial.

(B) Whether the denial of the motion for continuance deprived the petitioner of his Sixth Amendment right to compulsory service of process and right of confrontation.

(C) Whether the condition which the district judge imposed upon the reception of the prior

reported testimony of Powell violated petitioner's Sixth Amendment right to compulsory service of process and right of confrontation.

2. Petitioner's defense was that of entrapment. The uncontroverted evidence is that, prior to the time the informant and the Indiana State Police Officer approached the petitioner, they had no probable cause to believe that petitioner was engaged in the unlawful sale and possession of drugs. The question presented is:

(A) Where a police officer and an informant induce a defendant to make a sale of dangerous drugs without having any probable cause to believe that said defendant is engaged in the sale of dangerous drugs, is entrapment established as a matter of law?

3. In the course of the trial, the Government produced only two witnesses, the chemist and the police officer. The chemist identified the drugs; the police officer testified as to the transactions concerning the sale of the drugs between himself, the petitioner and Powell. The petitioner's wife was the only witness on behalf of the petitioner. She was not present during any of the conversations or transactions between the police officer, Powell and the petitioner. In his final summation, the Government's attorney stated to the jury that "there is but really one substantive witness, an undercover policeman," that his testimony was uncontroverted. The petitioner did not testify. The question presented is:

(A) Where argument is made that the testimony of a witness is uncontroverted and the only witness who could controvert that testimony is the defendant, does such argument con-

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stitute comment on the defendant's failure to testify?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment Six

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor . . ."

The Constitution of the United States, Amendment Five

"No person shall . . . be compelled in any criminal case to be a witness against himself."

STATEMENT OF FACTS

On August 18, 1967, a paid Government informant with an extensive record of convictions and an Indiana State Police Sergeant went to the petitioner's home where he conducted a retail clothing business. After they sold to him some ostensibly stolen merchandise at thirty per cent (30%) of retail value, the informant took the petitioner aside and asked him if he would sell him some "stuff" for his "booster broad." This offer was declined by the petitioner. The informant renewed his request as he was leaving the premises, at which time the petitioner stated he had some phenobarbital, if that would help. No response was made by the informant and the police officer as to the offer of phenobarbital.

They returned on the following night, August 19, 1967, and again renewed their request for drugs or stuff. After some prolonged discussion in which the petitioner stated that he was no longer dealing in the stuff, he said he had some sleeping pills. He went upstairs, returned with eight (8) capsules of sodium nembutal, gave them to the informant. The informant asked him how much he owed him, the petitioner stated at first "nothing", then stated "Give me a buck." The informant and the police officer

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returned on three subsequent occasions within the next few days and made larger purchases of the sodium nembutal capsules for larger amounts of money; the final one culminating in the sale of some 300 capsules for Fifty ($50.00) Dollars, at which time the petitioner was arrested.

Prior to the first trial, petitioner had filed a motion demanding that the informant be produced at the trial. The motion was granted and the informant testified as a witness for the Government. Petitioner was convicted; an appeal was taken; and the judgment of conviction was reversed on the ground that the trial judge erred in admitting certain prejudicial hearsay testimony with respect to the petitioner's reputation and predisposition to engage in the unlawful sale of drugs. *U. S.* v. *Johnston*, (7th Cir. 1970) 426 F.2d 112.

On May 21, 1971, counsel for defendant inquired of Government counsel whether the informant would be produced. Counsel for the Government stated that, although he was not planning to use the informant as a Government witness, he was attempting to locate him and to have him present at the trial. On the morning the trial was scheduled to commence, the informant had not been located and a colloquy was held in chambers between the Court and respective counsel concerning the nonavailability of the informant. At that conference, the trial judge stated he would permit the petitioner to use the prior reported testimony of the informant on the condition that the defendant waive any and all objections to the nonproduction of the informant by the Government. The petitioner declined to accept that condition. Although this conference was not reported of record, it is supported by the uncontroverted affidavit of counsel for the petitioner. (Petitioner's brief, Addendum P. 1)

Petitioner's motion for continuance was denied; the trial was commenced. Two witnesses testified for the

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Government—the chemist who identified the seized drugs as barbiturates, and the Indiana State Police Sergeant who testified as to all the transactions and conversations held between himself, the petitioner and the informant. There was no evidence adduced by the Government to demonstrate that the Government had probable cause to suspect that the petitioner was engaged in the illicit sale of drugs and/or narcotics. The initial inducement had been made by the informant. It was uncontroverted that the petitioner declined the initial request of the informant. On this state of the record, the petitioner contended below, as he does here, that entrapment was established as a matter of law.

Only one witness testified on the petitioner's case in chief — his wife. She was not a party to any of the conversations or transactions between the petitioner, the informant and the Indiana State Police Sergeant. In his summation, the Government attorney stated to the jury that there was but really one substantive witness, the undercover policeman, and that his testimony as to the transactions between the petitioner, himself and the informant were uncontroverted. Petitioner moved the Court to declare a mistrial on the basis that this argument constituted comment on the defendant's failure to testify, since he was the only person who could controvert the testimony of the Indiana State Police Sergeant. The motion was denied.

Petitioner was convicted on all seven counts of the information. The petitioner was sentenced to a term of imprisonment of one (1) year as to each of the counts, the sentence to run consecutively as to Counts I, II, and III: sentence as to Counts IV, V, VI and VII was suspended and the petitioner placed on probation for five (5) years after service of the executed sentence imposed in Counts I, II and III. A fine of One thousand ($1,000.00) Dollars was assessed as to Count I.

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REASONS FOR GRANTING THE WRIT

The thrust of petitioner's contention that the trial judge committed error in denying a continuance due to the non-production of the Government informant was essentially this: the witness was a paid Government informant who had made the initial inducement outside the presence of any other witness to the petitioner and made other inducements in the presence of the Indiana State Police Sergeant to the petitioner. Denial of the motion for continuance effectively deprived the petitioner of his right of confrontation against a material witness, even though that witness did not testify. Since the only defense available to the petitioner was that of entrapment, he was required to elect which constitutional right he should sacrifice — the right to compulsory process of service and confrontation or the right not to testify and be a witness against himself. He elected not to forfeit his constitutional right to remain silent.

In the course of both trials, it was undisputed that neither petitioner nor his counsel were ever cognizant of the informant's whereabouts so as to render him amenable to subpoena. When the first judgment of conviction was reversed, the Government was charged with knowledge that the informant's presence would again be necessary should the Government seek to retry the petitioner. The failure of the Government, therefore, to procure the attendance of the informant at the trial violated the petitioner's Sixth Amendment right to compulsory process.

A defendant in a criminal case is guaranteed the right to compel attendance of witnesses and who those witnesses shall be is a matter for defendant and his counsel to decide and it does not rest with the prosecution or a person under

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subpoena. *U.S.* v. *Seeger,* (1960) D.C. N.Y., 180 F.Supp. 467.

In *Washington* v. *State of Texas,* (1967) 388 U.S. 14, 87 S.Ct. Rep. 1920, this Court held that a defendant's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor is applicable to the States through the Fourteenth Amendment, stating

> "the right to offer the testimony of witnesses and to compel their attendance if necessary is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law . . ." (at P. 1923, S.Ct. Rep.)

In *Roviaro* v. *U.S.,* (1957) 353 U.S. 53, 77 S.Ct. 623, this Court held that disclosure of the identity of an informant was required where the informant had taken a material part in bringing about the defendant's possession of heroin and he was the only witness in a position to amplify or contradict the testimony of Government witnesses. The factual situation in the case at bar is merely a logical extension of why disclosure was required in *Roviaro.* Disclosure was held to be required because the informant might possibly be a witness for the defendant.

In pointing out why disclosure was required, this Court stated

> "The circumstances of this case demonstrate that John Doe's possible testimony was highly relevant and might have been helpful to the defense. So far as petitioner knew, he and John Doe were alone and un-

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observed during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross examine police officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it; his testimony might have disclosed an entrapment . . . The desirability of calling John Doe as a witness or at least interviewing him in preparation for trial was a matter for the accused rather than the Government to decide.

"Finally, the Government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of the non-disclosure in this case. The only person other than petitioner himself who could controvert, explain or amplify Bryson's report of this important conversation was John Doe . . ." (At Pp. 63, 64 U.S. Report) (Our emphasis)

All of the reasons which impelled this Court to hold that disclosure was required in *Roviaro* so that the defendant might call the informant as a witness exist in this case. Here, as in *Roviaro,* unless petitioner waived his constitutional right not to take the stand in his own defense, Powell was his one material witness on the issue of entrapment. Here, as in *Roviaro,* the opportunity to cross examine the police officer could not substitute for the opportunity to examine Powell. Here, as in *Roviaro,* Powell had helped to set up the criminal occurrence and had played a prominent part in it and his testimony would have supported the defense of entrapment. Here, as in *Roviaro,* the only person other than the petitioner himself

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who could controvert, explain, contradict or amplify the conversations between the defendant and the police officer was Powell.

THE ENTRAPMENT ISSUE

The uncontroverted evidence shows that the criminal design originated in the minds of the law enforcement officer and the informant, that the initial inducement was refused by the petitioner. There is no evidence in the record of any prior traffic in drugs by the petitioner or that law enforcement agents had any information to believe that he was selling narcotics or drugs.

The rule enunciated by this Court in *Sorrells* v. *U.S.*, (1932) 287 U.S. 435, 53 S.Ct. 210, that

> ". . . when the criminal design originates not with the accused but is conceived in the mind of the Government officers and the accused is by persuasion, deceitful representation or inducement lured into the commission of a criminal act, the Government is estopped by sound public policy from prosecution therefor . . ."

governs the factual situation here.

In *Sherman* v. *U.S.* (1958) 356 U.S. 369, 78 S.Ct. 819, this Court explicitly condemned the type of conduct demonstrated by the law enforcement officials in the case at bar. In *Sherman* there was some evidence that the defendant there had previously trafficked in narcotics and had been twice convicted for selling and possessing them. There is not one scintilla of evidence in the case at bar which would support an inference that the petitioner here was engaged in the sale of drugs or narcotics.

At the same time the petitioner was arrested, there were six customers of his retail clothing business in his home.

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There is no evidence that he dispensed or sold drugs or narcotics to any of them or ever offered to. Although a thorough search of the petitioner's premises was made, there was no evidence introduced of any other narcotics, drugs of any nature whatsoever found on the premises, other than the sodium nembutal which had been sold to the Government agents.

When the evidence points toward inducement by the Government, it then becomes incumbent upon the Government to meet the claim of entrapment by showing a predisposition or readiness on the part of the accused to commit the offense. *Hansford* v. *U.S.* (1962) D.C. Cir. 303 F.2d 219; *U.S.* v. *Masciale,* (1956) 2nd Cir. 236 F.2d 601. The Government here failed to sustain that burden; the Government's own evidence demonstrated entrapment as a matter of law.

THE DENIAL OF THE MOTION FOR MISTRIAL

Petitioner had contended that the trial judge erred in denying his motion for a mistrial, predicated upon argument of the Government attorney which the petitioner contended constituted comment on the petitioner's failure to testify. The objectionable language is as follows:

> "First of all, let me say that this case, as I indicated at the outset, is unusual in the sense that we have *but really one substantive witness,* it was an undercover policeman. (our emphasis) . . . As to the undercover work by Mr. Wolfe — now Lieutenant Wolfe — I think much of that testimony, likewise, is uncontroverted; that is to say, that as to the transactions between himself and an informant by the name of Ernest Powell and the defendant, that substantially they took place the way he testified . . ." (Opinion pages 3 and 4)

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The opinion of the Court of Appeals finds no error because

> ". . . the record clearly indicates, however, that a number of persons other than the defendant were present at his residence at various times described in Wolfe's testimony and, therefore, were potential witnesses; indeed, the defendant's wife did testify. The reasoning of *U.S.* v. *Handman* is, therefore inapplicable to the situation before us . . ." (Opinion p. 4)

The record in this case conclusively demonstrates that the only persons present who could conceivably testify as to the conversations or the transactions between the informant, the police officer and the petitioner were those three persons. The testimony of the police officer affirmatively discloses that the conversations and the transactions were not made in the presence of any other possible witness.

It is true that the petitioner's wife was present in another room. Her testimony, however, was limited for the most part to establishing that the sleeping tablets had been in possession of the family for a long period of time and that they had been used by various members of the family. (App. p. 223-234)

The only conversation which she professed to hear were fragments of the conversation held between the petitioner, the police officer and the informant at the front door on the night of August 18, while she was in another room, sitting on a couch, watching television. The only persons present during the course of any of the other conversations and transactions were the petitioner, the police officer and the informant.

The initial inducement was made by the informant to the petitioner outside the presence of anyone else, including

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the police officer. The petitioner was not charged with either possession or sale for the events which occurred on August 18. The vital transaction occurred on August the 19th, for which the petitioner was charged, and the record is clear that there was no one present during any of the conversations or transactions on August 19, except the informant, the police officer and the petitioner.

The case at bar, therefore, lies squarely within the ambit of *U.S.* v. *Handman*, (1971, 7th Cir.) 447 F.2d 853, since only the petitioner here could have challenged the police officer's testimony. The comment on the petitioner's failure to testify was underscored by the prefatory remark of counsel for the Government that

"... there is really but one substantive witness."

In *Desmond* v. *U.S.* (1965 CA 1) 345 F.2d 225, where the defendant was on trial on a narcotics charge, the Government attorney in his final summation referred to an alleged occasion on which the defendant transferred heroin to a Government agent, stating that "the evidence stands unimpeached and uncontradicted." Since no one but the defendant or his co-defendant who could not be put on the stand against his will could have contradicted the Government witness, it was held that such a statement constituted improper comment on the defendant's failure to testify.

A long line of decisions in the State Courts in various jurisdictions holds that remarks by a prosecuting attorney or judge that evidence offered by the prosecution is uncontradicted and where the defendant is the only person who could or would have contradicted the evidence constitute comment on the failure of the defendant to testify. *Street* v. *State* (1957) 266 Ala. 289, 96 S.2d 686; *Miller* v. *Commonwealth* (1918) 182 Ky 438, 206 S.W. 630; *People* v.

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Payne (1902) 131 Mich. 474, 91 N.W. 739; *Martin* v. *State* (1946) 200 Miss. 142, 26 S.2d 169; *State* v. *Snyder* (1904) 182 Mo. 462, 82 S.W. 12; *Turner* v. *State* (1940) 138 Texas Cr. 228, 135 S.W. 2d 488.

In the case at bar, the only person who could have controverted the testimony of Wolfe was the petitioner himself. Prior to the argument, counsel for petitioner had specifically requested the Court not to give the instruction as to the petitioner not testifying and that instruction was not given. (App. P. 239)

The reason, although it does not appear in the record, for requesting the instruction not to be given is the belief of many trial lawyers that the giving of such an instruction calls the attention of the jury to the fact that the defendant did not testify. That strategy was thoroughly demolished by the argument of Government counsel.

CONCLUSION

The rationale of this Court's holding in *Roviaro* v. *U. S.* (1957) 353 U.S. 53, 77 S.Ct. 623, compels the conclusion that not only disclosure of an informant who played a material role in the alleged criminal offense is required but that production of that informant at the request of the defendant is mandatory. To hold otherwise would completely emasculate the reasoning which led to this Court's decision in *Roviaro*. Disclosure without the concomitant requirement of production would be an empty remedy. The record here demonstrates a lack of a good faith effort on the part of the Government to produce the informant and an abuse of discretion by the trial judge in not granting the continuance so that the informant's attendance at the trial could be secured. The posture of the case was such, with the absence of the informant, that the petitioner would

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have been compelled to sacrifice his constitutional right not to testify in order to establish his defense of entrapment.

As to the second issue, entrapment as a matter of law, the petitioner is requesting this Court to lay down specific guidelines as to what constitutes entrapment as a matter of law. Before police officers and Government Agents are permitted to approach a putative defendant for the purpose of inviting him to commit a criminal act, it should be required that they be armed with facts constituting probable cause to believe that if such an invitation is extended it will be accepted. The decisions in *Sorrells* and *Sherman*, although not spelling this out explicitly, certainly suggest this to be the desirable standard.

Finally, it is submitted that this Court should make it abundantly clear to over-zealous Government attorneys that comment which impinges upon a defendant's exercise of his constitutional right not to incriminate himself will not be tolerated.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 71-1558

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ARTHUR MILTON JOHNSTON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 71 S CR 20 — Robert A. Grant, Judge.

ARGUED SEPTEMBER 11, 1972 — DECIDED OCTOBER 27, 1972

Before SWYGERT, *Chief Judge*, and PELL *and* STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge.* For the second time appellant asks us to reverse his conviction on each of seven counts charging sale or possession of a "depressant or stimulant drug" in violation of 21 U.S.C. § 331(q)(2) and (3). The first conviction was set aside because certain prejudicial evidence was improperly received; in that opinion we rejected the defense of entrapment as a matter of law.

United States v. *Johnston*, 426 F.2d 112 (7th Cir. 1970). Appellant now argues that the trial court erroneously (1) denied a motion for continuance; (2) denied a motion for mistrial based on improper closing argument; (3) excluded certain hearsay evidence; and (4) foreclosed him from asserting his entrapment defense to the possession counts. We affirm.

I.

On five separate occasions in August of 1967 an Indiana state police officer named Wolfe and an informer named Powell visited the defendant at his residence, which also served as his place of business, in Gary. Although the defendant knew Powell, he did not know Wolfe, and he did not know that Powell was actually in custody with charges of burglary, conspiracy, arson and theft pending against him.

On each of the five visits Powell and Wolfe delivered various quantities of new merchandise to the defendant, impliedly representing that the goods had been stolen by a female accomplice. On each occasion defendant determined the retail value of the items and then paid 30% of that amount to Wolfe and Powell. On each occasion Powell asked defendant for stome "stuff" for his female accomplice. Defendant stated that he did not deal in "stuff," and on the first visit offered to obtain some phenobarbital. This offer was declined. On subsequent visits defendant sold various quantities of sodium nembutal to Wolfe and Powell; on the final visit, when he was arrested, he had 297 capsules in his possession.

Defendant's wife testified that the nembutal capsules had been obtained for domestic use. Defendant contended that apart from the specific sales to Wolfe and Powell there was no evidence that his possession of nembutal

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was unlawful. Thus he urged entrapment as a defense to the possession as well as the sale counts.

Prior to the first trial the court ordered the government to produce Powell as a witness. Powell was produced and testified as a government witness. He was cross-examined at great length, partly for the purpose of developing the entrapment defense.

Prior to the second trial, which was held more than two years after the first, defense counsel was advised by the government that Powell could not be located and therefore would not testify. At the commencement of the trial defendant moved for a continuance on the ground that the government was under a continuing obligation to make Powell available as a witness in view of the order entered prior to the first trial and the fact that he had acted as a paid informer.

The defendant had previously moved for a continuance because of the unavailability of defendant's wife, who had been divorced in the interim. The parties stipulated that her prior testimony could be read to the jury, and that motion was withdrawn. No question of a continuance on account of Powell's unavailability was raised before trial, and the parties were unable to stipulate on the use of portions of his testimony.[1]

We do not agree with defendant's position that the government was under a continuing obligation to keep Powell available. The order entered in advance of the first trial pertained only to that trial, not to the unlikely contingency of a second trial some years later. Moreover, it appears that the government did make a good faith

[1] Apparently the defendant wanted only certain parts read to the jury, a procedure unacceptable to the government, and the government wanted defendant to waive any objection to the nonproduction of Powell.

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effort to locate Powell and he was simply unavailable. No issue with respect to the possible use of his former testimony is before us, since none of it was offered. Nor, contrary to defendant's argument, do we have a question of confrontation, since Powell did not testify at the second trial. Under all the circumstances we think the trial judge properly exercised his discretion in denying the motion for a continuance.

II.

In his closing argument the prosecutor stated:

> "First of all, let me say that this case, as I indicated at the outset, is unusual in the sense in that we have but really one substantive witness, it was an under-cover policeman.
>
> "The fact—and I believe it is an uncontroverted fact, that the drug involved was of a type prohibited by law goes without saying, as was testified to by the chemist, Miss Rummel.
>
> "As to the under-cover work by Mr. Wolfe—now Lieutenant Wolfe—I think much of that testimony likewise is uncontroverted; that is to say, that as to the transactions between himself and an informant by the name of Ernest Powell and the defendant, that substantially they took place the way he testified."

The defendant moved for a mistrial on the ground that this argument constituted a comment on the failure of the defendant to testify. The record clearly indicates, however, that a number of persons other than the defendant were present at his residence at various times described in Wolfe's testimony and therefore were potential witnesses; indeed, the defendant's wife did testify. The rea-

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soning of *United States* v. *Handman* is therefore inapplicable to the situation before us.[2]

III.

When defendant was arrested, several other persons, presumably customers of defendant's "retail business," were present. In the cross-examination of Wolfe, defendant's counsel started to inquire into conversations between those customers and various police officers who had joined Wolfe in effecting the arrest. An objection to this line of inquiry was sustained; and defendant offered to prove that Wolfe would testify that the persons present told the police officers that they had never been offered drugs or narcotics by defendant.

The offer was properly rejected as irrelevant hearsay.

IV.

Finally, defendant argues (A) that he was entitled to a judgment of acquittal on all counts because the evidence established entrapment as a matter of law, and (B) that the court improperly withdrew the entrapment defense to the possession counts from the jury. As we determined on the prior appeal, the record does not establish entrapment as a matter of law. However, the question whether the jury should have been permitted to consider the evidence of entrapment in relation to the possession counts is somewhat different.

Under Counts II, V and VII of the Information, evidence that defendant had nembutal in his possession would not necessarily establish his guilt. One of the elements of the alleged offense was that the possession was unlawful because "for the purpose of sale." The government argued

[2] "And there is nothing in this record to show that anybody but Handman could have challenged or contradicted Solomon's vital testimony." 447 F.2d 853, 855 (7th Cir. 1971).

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that the quantities of the substance in defendant's possession, together with the evidence that he actually made sales to Wolfe and Powell, establish the requisite unlawfulness. The defendant argued that his wife's testimony established that his original possession was lawful and that the sales were the product of entrapment. Thus, the entrapment defense should have been submitted to the jury on the possession as well as the sales counts.

The defendant tendered the following instruction:

> "If you find that when the defendant delivered eight capsules of sodium nembutal to Ernest Powell on August 19, 1967, this delivery was brought about by the unlawful entrapment of the defendant, I instruct you that you cannot find the defendant guilty of any of the sales Counts of the Information, the same being Counts I, III, IV and VII of the Information. I further instruct you that should you find that the defendant was unlawfully entrapped with respect to the sales Counts of the Information, you cannot consider any evidence relating to such sales in determining the guilt or innocence of the defendant under Counts II, V and VII, the possession Counts of the Information."

The judge refused this instruction, apparently interpreting our former opinion as foreclosing the assertion of any entrapment defense to the possession counts unless the defendant admitted that his possession was unlawful. We believe the tendered instruction was proper. Nevertheless, it is clear that defendant was not prejudiced by the court's refusal to give it. The jury did not "find that the defendant was unlawfully entrapped with respect to the sales Counts of the Information, . . ." Accordingly, even if the instruction had been given, the jury could properly consider the evidence relating to the sales in determining guilt or innocence under the possession counts.

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We find no prejudice in the court's explanation to the jury of the reasons for withdrawing the defense of entrapment to the possession counts.[3] The explanation merely emphasized to the jury that defendant had denied that his possession of nembutal was unlawful. Consistently with that position, defendant still urges that the entire case turned on whether or not the sales transactions were the product of improper entrapment.

Since the only basis for a claim of entrapment on the possession counts was the evidence on which defendant relied to establish his entrapment defense on the sales counts, the verdict of guilty on the sales counts necessarily rejected the only basis for a claim of entrapment on the possession counts. If defendant was not unlawfully entrapped on the sales counts, he could not have been unlawfully entrapped with respect to the possession counts. Accordingly, there can be no doubt that the jury would have convicted defendant even if the tendered instruction had been given.

The judgment is

AFFIRMED.

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[3] The court gave the following instruction requested by the government:

"The defendant having raised the defense of entrapment, admits that he sold the articles charged in Counts I, III, IV and VI; that is, that he sold or delivered a depressant or stimulant drug. Therefore, the only question you must decide as to those Counts of the Information is whether under all the facts and circumstances of this case, he was unlawfully entrapped into committing those acts.

"However, there can be no defense of entrapment as to Counts II, V and VII because the defendant has not admitted unlawful possession of a depressant or stimulant drug and as to those Counts, you must ignore the defense of entrapment and consider the case on the basis of the other instructions I have given you."

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SWYGERT, *Chief Judge*, Concurring. The denial of the entrapment instruction on the possession counts has previously been considered and decided by this court in the appeal from the first conviction. *United States* v. *Johnston*, 426 F.2d 112, 114 (7th Cir. 1970). Regardless of my position if this issue was originally before me, our previous pronouncement is the law of the case. The district judge followed our decision in denying the requested entrapment instruction. In these circumstances, I concur in the affirmance of the conviction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 16, 1972

Before
Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

No. 71-1558

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ARTHUR MILTON JOHNSTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

(71 S CR 20)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be and the same is hereby *denied*.